

1 plaintiff sent defendant microDATA a "cease and desist" letter on that date regarding
 2 microDATA's use of the mark. A true and accurate copy of that letter is attached hereto as
 3 Exhibit A. (See also Plaintiff's Memorandum of Points and Authorities in Support of Motion for
 4 Preliminary Injunction, p. 3, line 25.)

5 3. On July 9, 2006, I set the greeting for my voice mail with the following message:

6 "Hi this is Mark Good, I am currently out of the office in trial out of
 7 County and will be out of the office until about July 23rd. If you
 8 need immediate assistance during my absence please contact my
 secretary Eileen Torrez at Terra Law's San Jose office at (408) 299-
 1200."

9 4. On July 9, 2007, I then left for what was expected to be a two week trial in Contra
 10 Costa County.

11 5. The case set for trial settled, and when I returned to my office on July 12, 2007, I
 12 was surprised to hear a message from William Adams requesting a stipulation to reschedule the
 13 hearing date for Hubb's Motion for Preliminary Injunction, considering the fact that my outgoing
 14 message stated that I would be gone until July 23rd. I also found out that on July 11, 2007, Hubb
 15 had filed the instant motion to reschedule.

16 6. On July 12, 2007, I re-checked my voice mail message by calling my office line
 17 from a different phone, and confirmed that the outgoing message was the same as recited above.

18 7. I spoke with both my secretary Eileen Torrez and Breck Milde regarding Mr.
 19 Adams call. Both Ms. Torrez and Mr. Milde advised me that Mr. Adams had not contacted them,
 20 nor had he left any messages for them.

21 8. A true and accurate copy of microDATA GIS, Inc.'s Reply in Support of Its Motion
 22 to Dismiss is attached hereto as Exhibit B.

23 I declare under penalty of perjury under the laws of the State of California and the United
 24 States of America that the foregoing is true and correct and that this declaration is executed on July
 25 12, 2007 at San Jose, California.

26 /s/ Mark W. Good
 27 Mark W. Good
 28

EXHIBIT A



FITZGERALD ABBOTT & BEARDSLEY LLP
ATTORNEYS AT LAW

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Mary Beth Trice
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January 3, 2007

VIA FEDERAL EXPRESS

President
microData GIS, Inc.
1016 US Route 5
St. Johnsbury, VT 05819

Re: Trade Name and Trademark Infringement

Dear Sir or Madam:

We represent Hubb Systems, LLC ("Hubb") of Alameda, California. For over twenty years, Hubb has been in the business of providing mobile computing solutions for public safety agencies and has used the trade name and trademark "DATA911" in connection with this business and the goods it sells since at least 1989. Hubb owns a federal trademark registration for "DATA911" in Class 9 on the Principal Register of the United States Patent and Trademark Office, Registration Number 2,546,009 (please see enclosed copy of U.S. Registration Certificate Number 2,546,009).

Your company ("microData") recently changed its trade name and trademark from "microData GIS" to "microDATA 911" and is using this mark to identify computer goods and services very similar to those sold by Hubb under its federally registered trademark. In connection with this re-branding, microData has also registered and is using "microdata911.com" as the URL for its Internet website.

This conduct by microData infringes the prior rights of Hubb in its trade name and federally registered trademark. Hubb strenuously objects to this infringement and demands that microData immediately discontinue any and all use of use of the name, trademark and URL "microDATA 911". Additionally, Hubb demands that microData assign to Hubb any registrations it owns for the URL "microdata911" in the ".com" domain and any other domains.

Please contact the undersigned as soon as possible to confirm that you will comply with these demands. If you do not respond by January 20 or if you refuse to cooperate with Hubb by taking all steps needed to rectify this infringement, Hubb will pursue legal action as needed to protect its rights.

President

Page 2

January 3, 2007

This letter is sent without prejudice to any rights, claims or remedies that Hubb may have, all of which are expressly reserved.

Very truly yours,

FITZGERALD ABBOTT & BEARDSLEY LLP

By

A handwritten signature in cursive script, appearing to read "Mary Beth Trice".

Mary Beth Trice

MBT:svr

Enclosure

EXHIBIT B

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10 Counsel for Defendant microDATA GIS, Inc.

11
 12 UNITED STATES DISTRICT COURT

13 FOR THE NORTHERN DISTRICT OF CALIFORNIA

14 HUBB SYSTEMS, LLC,

15 Plaintiff,

16 v.

17 MICRODATA GIS, INC.,

18 Defendant.

) Case No. C07-02677 BZ

)
) **DEFENDANT MICRODATA GIS, INC.'S**
) **REPLY IN SUPPORT OF ITS MOTION TO**
) **DISMISS**

) Date: August 1, 2007

) Time: 10:00 a.m.

) Courtroom: G

) Magistrate Judge Bernard Zimmerman

19
 20
 21 Defendant microDATA GIS, Inc. ("microDATA") submits the following Reply in support
 22 of its Motion to Dismiss ("Motion") and in response to Plaintiff Hubb Systems, LLC's ("Hubb's")
 23 Opposition ("Opposition") to the Motion (Docket Entry 28). microDATA's Motion should be
 24 granted pursuant to the first-to-file rule, and because there is no personal jurisdiction over
 25 microDATA in California.

26 After a hearing on the first to file rule issue on July 9, 2007, the District Court in Vermont
 27 did not grant either microDATA's motion to enjoin or Hubb's motion to dismiss, but elected to
 28 defer to this Court on whether the case should proceed here or in Vermont. Accordingly, the court

1 stayed the action pending the outcome of microDATA's Motion here. See Request for Judicial
 2 Notice, Order, July 9, 2007, microDATA GIS, Inc. v. Hubb Systems, LLC, United States District
 3 Court, District of Vermont, C.A. No. 2:07-cv-108 (Docket Entry 18-19). There is precedent for
 4 the first-filing court to defer to the judgment of the second-filing court on the issue of which action
 5 should proceed. In Ward v. Follett Corp., 158 F.R.D. 645, 647-48 (N.D. Cal. 1994), the first-filing
 6 court (Illinois) declined to take any action in the case pending the outcome of the motion to
 7 dismiss that the plaintiff in the first-filed action had filed in the second action (California). The
 8 second-filing court (this District) granted the first-filer's motion to dismiss and the case returned to
 9 the first court. microDATA respectfully submits that this Court should likewise rule that the
 10 action should proceed in the first court.

11 **A. This Case Does Not Fall Within The So-Called "Anticipatory Filing"**
 12 **Exception To The First-To-File Rule And The Well-Settled First-To-File Rule**
Should Be Respected.

13 The essential facts of this dispute are: (1) on January 3, 2007 Hubb sent microDATA a
 14 letter accusing it of trademark infringement and threatening to "pursue legal action," but without
 15 saying when or where it would institute such action; (2) on January 18 microDATA wrote to Hubb
 16 disputing the trademark infringement claims; (3) on April 27, Hubb sent a letter rejecting
 17 microDATA's arguments and again threatening to "pursue legal action" – again without saying
 18 when or where – if it did not have microDATA's agreement to "cease and desist" by May 10; (4)
 19 on May 10 microDATA filed for declaratory judgment in Vermont and immediately sent Hubb a
 20 copy of its filing; and (5) on May 21, without further ado, Hubb filed this duplicative action,
 21 without informing this Court of the pending Vermont action.¹ Hubb now challenges
 22 microDATA's right to proceed with the Vermont action. Leaving aside the fact that the so-called
 23 "anticipatory filing" exception to the first to file rule has been criticized as a doctrine by courts and
 24 commentators, including in several decisions from this very District, it does not apply to this case
 25 in any event.

26
 27 ¹ Each party promptly served the other party with its respective suit papers, so there is no
 28 issue of service.

1 This District has consistently demonstrated reluctance to apply the “anticipatory filing”
 2 exception. See Google, Inc. v. Am. Blind & Wallpaper Factory, Inc., 2004 U.S. Dist. LEXIS
 3 27601 (N.D. Cal. Apr. 8, 2004) (“Considerations of sound judicial administration discourage
 4 anticipatory actions so as to encourage owners of intellectual property to engage in settlement prior
 5 to filing suit, but such considerations do not require that a party in continuous apprehension of a
 6 lawsuit be precluded from seeking declaratory relief in light of repeated threats”); M.D. Beauty,
 7 Inc. v. Dennis F. Gross, M.D., P.C., 2003 U.S. Dist LEXIS 27257 (N.D. Cal. Oct. 27, 2003) (if the
 8 “anticipatory filing” exception were applied broadly, “each time a party sought declaratory
 9 judgment in one forum, a defendant filing a second suit in a forum more favorable to defendant
 10 could always prevail”); Royal Queentex Enters., Inc. v. Sara Lee Corp., 2000 U.S. Dist. LEXIS
 11 10139 (N.D. Cal. Mar. 1, 2000) (rejecting the “anticipatory filing” doctrine stating, “Royal
 12 Queentex clearly had the right both to reject Sara Lee’s offer to discuss settlement and to take an
 13 aggressive stance by immediately filing a declaratory judgment action upon receiving the cease and
 14 desist letter”); British Telecommunications v. McDonnell Douglas Corp., 1993 U.S. Dist. LEXIS
 15 6345 (N.D. Cal. May 3, 1993) (“while the filing of the [first-filed, declaratory judgment] action
 16 one day before the deadline does present the appearance of an anticipatory suit, such a finding does
 17 not compel the district court to dispense with the first-to-file rule”).

18 Hubb concedes that “the first to file rule is well settled in the Ninth Circuit.” Opposition at
 19 5. Hubb is entirely correct. Hubb then goes on, however, to try to shoehorn the straight-forward
 20 and unremarkable pre-suit facts of this case into the mold of the extraordinary circumstances that
 21 have been found, on rare occasion, to constitute an exception to the first-to-file rule: bad faith,
 22 anticipatory filing, or forum shopping.² None of these extraordinary circumstances apply. Hubb
 23 relies principally on three cases – Xoxide, Inc. v. Ford Motor Co., 448 F.Supp.2d 1188 (C.D. Cal.
 24 2006); CGI Solutions, LLC v. SailTime, 2005 U.S. Dist. WL 3097533 (S.D.N.Y. Nov. 17, 2005);
 25 Utica Mut. Ins. Co. v. Computer Sciences Corp., 2004 U.S. Dist. WL 180252 (N.D.N.Y. Jan. 23,

26
 27 ² The latter two considerations are frequently considered the same. See M.D. Beauty,
 28 supra, at *8.

1 2004) – only one of which is from a court within the Ninth Circuit and none of which is from this
2 District. Opposition at 6-8. Each of these cases is factually very different from the case at bar.

3 In the Xoxide case, Ford Motor Company accused Xoxide of trademark infringement.
4 Over the course of three months, the parties exchanged several letters over Ford's accusations,
5 Xoxide's denials, and possible settlement. After asking Ford for additional time to respond to
6 Ford's last letter, Xoxide *secretly* filed suit. Four days after it filed suit, Xoxide wrote to Ford
7 denying that its business name ("MustangTuning") and Internet domain name
8 ("mustangtuning.com") infringed on Ford's trademarks. In its letter to Ford, Xoxide did not
9 mention that it had already filed suit. When Ford found out about Xoxide's secret filing, it filed
10 suit in Michigan and sought dismissal of Xoxide's suit in California. In granting Ford's motion to
11 dismiss, the court found that Xoxide had acted in bad faith by surreptitiously filing suit while
12 continuing to delay Ford from filing suit by pretending to engage in "settlement discussions." 448
13 F.Supp.2d at 1194.

14 The facts of the instant case are nothing like those of Xoxide. microDATA did not attempt
15 to hide its filing while continuing to negotiate with Hubb. On the contrary. Given the time that
16 had elapsed between microDATA's January 18 response to Hubb's first cease and desist letter, and
17 Hubb's next communication (April 27), by May 10 microDATA had a legitimate concern about
18 Hubb possibly again taking a long time to respond to microDATA's decision, as stated in
19 microDATA's May 10 cover letter, not to acquiesce to Hubb's cease and desist demand. Rather
20 than being an anticipatory filing, therefore, microDATA's declaratory judgment action, about
21 which it made no secret, was intended to push the matter forward toward resolution and to avoid
22 having Hubb continue to hang the potential threat of litigation over microDATA for an indefinite
23 time.

24 Notably, Hubb's discussion of Xoxide in its Opposition (p. 6) fails to point out that it was
25 Xoxide's secretive and misleading behavior toward Ford that led the court to apply the
26 "anticipatory filing" exception.

27 In CGI Solutions, there was also bad faith conduct by the first-filer, CGI. During
28 negotiations with SailTime Licensing Group over a possible deal whereby CGI would become a

1 SailTime licensee, CGI had signed an agreement providing, inter alia, that any litigation between
2 the parties would be brought in Texas. When negotiations over the deal broke down, and it
3 appeared to SailTime that CGI had started its own business using SailTime's trade secrets, CGI
4 jumped the gun by abruptly filing a declaratory judgment action in New York. SailTime then filed
5 an action in Texas and sought dismissal of CGI's first-filed action. In granting SailTime's motion,
6 the court was strongly influenced by the fact that CGI had signed a document agreeing to a Texas
7 forum for all litigation. 2005 WL 3097533 at *8. Again, the facts of the instant case are nothing
8 like those of CGI. And, again, Hubb's discussion of CGI in its Opposition (p. 7) fails to mention
9 the consent-to-forum issue that played a critical role in the outcome of that case.

10 Finally, in Utica Mutual, the competing lawsuits arose out of the breakdown of a
11 contractual relationship. Utica Mutual had licensed software from Computer Sciences Corp.
12 (CSC). The license agreement contained a Texas choice-of-law provision. After using CSC's
13 software for a couple of years, Utica Mutual became dissatisfied with it, complained to CSC, and
14 discontinued making license payments to CSC. In a subsequent exchange of letters, CSC
15 threatened to sue but also offered a settlement proposal. Before the deadline given by CSC to
16 accept its settlement offer, Utica Mutual filed suit in New York. CSC later filed suit in Texas and
17 moved to dismiss the New York action. Important to the court's decision to grant CSC's motion
18 was the fact that Utica Mutual had agreed to be governed by Texas law, and this factor is
19 mentioned and discussed three times in the decision. 2004 WL 180252 at *2, *4 (n.2), *5. Also
20 important was the fact that Utica Mutual had "raced" to the courthouse immediately upon
21 receiving CSC's threat letter. Again, the facts of the instant case are nothing like those of Utica
22 Mutual. In the instant case there is no choice-of-law provision, and microDATA did not run to the
23 courthouse upon receiving Hubb's first "cease-and-desist" letter (Jan. 3) even though that letter did
24 contain a threat to sue microDATA. And, again, Hubb's discussion of Utica Mutual in its
25 Opposition (pp. 7-8) fails to mention that the choice-of-law agreement played a critical role in the
26 outcome of that case.

27 By contrast, this Court's decisions in Google, 2004 U.S. Dist. LEXIS 27601 (N.D. Cal.
28 Apr. 8, 2004), M.D. Beauty, 2003 U.S. Dist. LEXIS 27257 (N.D. Cal. Oct. 27, 2003), and Ward v.

1 Follett Corp., 158 F.R.D. 645 (N.D. Cal. 1994), all applying the first-to-file rule, are directly on
 2 point. Even under the remarkable facts of Sony Computer Ent. Amer., Inc. v. Amer. Med.
 3 Response, Inc., 2007 U.S. Dist. LEXIS 24294 (N.D. Cal. March 13, 2007), this Court did not find
 4 that the first-filer's declaratory judgment action was "anticipatory." In that case, before the
 5 competing lawsuits had been filed, the trademark owner, American Medical Response
 6 ("American"), had gone so far as to send the alleged infringer, Sony, a copy of a draft trademark
 7 infringement complaint that it intended to file if negotiations were not fruitful. In response, Sony
 8 promptly filed a declaratory judgment action in this Court. American then filed its own action in
 9 Texas and sought to dismiss Sony's action here under an exception to the first to file rule. This
 10 Court found that the facts did not justify a departure from the first to file rule and denied
 11 American's motion to dismiss, *even where American had drafted a complaint, sent a copy of it to*
 12 *Sony during negotiations, and threatened to file it, before Sony filed its declaratory judgment*
 13 *action.* Clearly, Sony knew that it was imminently about to be sued and raced to the courthouse to
 14 file a preemptive action. Yet this Court did not dismiss Sony's action. If the Sony scenario does
 15 not warrant a departure from the first to file rule, then certainly the more run of the mill facts of
 16 this case, in which Hubb expressed to microDATA a threat to file suit but no specific and concrete
 17 indication of when and where it might file, do not warrant a departure.³

18 Hubb's failure to inform this Court, when filing this action, of the already-pending action
 19 in Vermont, as it was required to do by Civil Local Rule 3-13, and its failure to inform the Court,
 20 in discussing the Xoxide, CGI, and Utica cases, of the critical factual specifics that led to the
 21 exceptional outcomes in those cases, suggest that it is Hubb, rather than microDATA, that is not
 22 playing fairly here.

23 In short, Hubb is trying to eat its cake and have it, too. Hubb wants the ability to
 24 persistently threaten microDATA with suit (as it did), but not actually sue, and yet retain the
 25

26 ³ Hubb's argument, on p. 11 of its Opposition, that the first-to-file rule does not apply
 27 when the first-filed action is a declaratory judgment action, is patently false. This Court's
 28 decisions in Sony, Google, M.D. Beauty, Royal Queentex, Ward, and British Telecommunications,
 all involved declaratory judgment actions.

1 unilateral right to decide where any litigation between it and microDATA will be if suit is
 2 commenced by either party. Hubb threatened microDATA with legal action, but when such action
 3 was in fact commenced by microDATA more than four months after Hubb's initial threat letter,
 4 Hubb wants to have that action dismissed so that it can sue microDATA in its preferred forum.
 5 That is not fair. Hubb accuses microDATA of forum-shopping, but it is Hubb that is engaging in
 6 forum-shopping.

7 **B. There Is No Personal Jurisdiction Over microDATA In California, Whereas**
 8 **There Is Personal Jurisdiction Over Both Parties In Vermont.**

9 microDATA's Motion explained at length its almost complete lack of contacts with
 10 California (no offices, no personnel, no registration to do business, no bank accounts, no phone
 11 numbers, etc.), and cited Ninth Circuit case law holding that incidental contacts with a state, such
 12 as attendance at occasional trade shows (primarily aimed at *national*, not California, audiences), do
 13 not confer personal jurisdiction. Motion at 13-14. microDATA has made no sales in California.
 14 See Supplemental Declaration of Bruce Heinrich, submitted herewith, at ¶ 3. Hubb's response is
 15 to argue that microDATA has attended several trade shows in California, Opposition at 12-13,
 16 although it does not contradict microDATA's assertion that it has made no sales in California. Cf.
 17 Advideo, Inc. v. Kimel Broadcast Group, Inc., 727 F. Supp. 1337 (N.D. Cal. 1989) (personal
 18 jurisdiction established in California over Vermont company; party's mere signing of contract with
 19 out-of-state company does not confer jurisdiction over out-of-state company in first party's home
 20 state, but contract provided for California governing law; therefore, out-of-state company
 21 implicitly submitted itself to jurisdiction in California).

22 By contrast, in its Opposition (p. 10) and in its motion to dismiss filed in the Vermont
 23 action, Hubb has admitted to having a customer in Vermont and doing business there.⁴
 24 microDATA believes that a very recent transaction between Hubb and the Barre City Police
 25

26 ⁴ See Request for Judicial Notice, Defendant Hubb Systems, LLC's July 2, 2007 Motion
 27 to Dismiss, microDATA GIS, Inc. v. Hubb Systems, LLC, United States District Court, District of
 28 Vermont, C.A. No. 2:07-cv-108 (Docket Entry 10). At page 15 of its motion, Hubb admits to
 having made at least one sale in Vermont.

1 Department constitutes a second Hubb customer in Vermont. See Declaration of Nathan G.
 2 Wilcox, ¶ 2. Thus, even if there is a question about the *possibility* of personal jurisdiction over
 3 microDATA in California, *there is no real question about personal jurisdiction over Hubb in*
 4 *Vermont. Ben & Jerry's Homemade, Inc. v. Comanor*, C.A. No. 1:02-cv-150 (D. Vt. Sept. 26,
 5 2002) (in declaratory judgment action brought in Vermont for declaration of non-infringement of
 6 defendant's trademark, there was jurisdiction over out-of-state defendant); *Tom and Sally's*
 7 *Handmade Chocolates, Inc. v. Gasworks, Inc.*, 977 F. Supp 297 (D. Vt. 1997) (distribution of four
 8 catalogs into Vermont, combined with two customers in Vermont, sufficient to confer jurisdiction
 9 over out-of-state corporation); *Dall v. Kaylor*, 163 274 (1995) (single sale in Vermont was
 10 sufficient to confer jurisdiction over non-resident defendant that advertised nationally); *Hedges v.*
 11 *Western Auto Supply Co., Inc.*, 161 Vt. 614, 614-615 (1994) (upholding exercise of personal
 12 jurisdiction where non-resident defendant "purposely availed" itself of Vermont market by selling
 13 its product to a well-known national distributor that does business in Vermont).

14 Personal jurisdiction over microDATA in California, based on attendance at a few trade
 15 shows, is not tenable. Hubb responds by requesting that it be allowed to do jurisdictional
 16 discovery. Opposition at 15. Rather than getting bogged down in a jurisdictional sideshow, i.e.,
 17 collateral discovery to determine whether there is even jurisdiction over microDATA in California
 18 – only to have this case end up in Vermont where it was filed first – this Court should simply
 19 follow the first to file rule and allow the case to proceed in Vermont, where there is no real
 20 question concerning personal jurisdiction over Hubb. microDATA, therefore, firmly believes that
 21 this Court should dismiss this action because its minimal, incidental contacts with California do
 22 not confer personal jurisdiction over it by this Court.

23 **C. Venue Is Proper in Vermont, Where The First Action Was Filed. Therefore,**
 24 **Considerations Of Whether Venue May Lie In California Are Irrelevant.**
Furthermore, Venue Is Not Superior In California.

25 Hubb argues that California is the appropriate venue for resolving this dispute. Opposition
 26 at 10. Notably, Hubb does not state that venue in California is *superior* to venue in Vermont,
 27 because it cannot. Indeed, venue may not lie in California at all. If, as microDATA contends,
 28 there is no personal jurisdiction over microDATA in California, then venue in California does not

1 exist.

2 But microDATA disputes Hubb's bald assertion that venue in California is "appropriate."
3 Assuming for the moment that there is personal jurisdiction over microDATA in California merely
4 because it attended national tradeshow here, microDATA concedes that venue *might* lie in
5 California. Hubb's argument for venue being appropriate in California is based on the assertion
6 that, since microDATA attended trade shows in California, the trademark infringement that it
7 complains of "happened" in California. This may or may not be true. But Hubb does not explain
8 why venue in California is *better* than venue in Vermont, the venue chosen by microDATA, the
9 first-filer.

10 microDATA, the alleged infringer, is located in Vermont (where Hubb admittedly does
11 business) and, to the extent that microDATA has allegedly infringed on Hubb's trademark, that
12 alleged infringement has clearly occurred in Vermont. Hubb could have sued microDATA in
13 Vermont, and there would be no dispute over venue. There can be no serious argument but that a
14 "substantial part of the events giving rise to the claim occurred" in Vermont. 28 U.S.C. § 1391(b).
15 Thus, while venue may exist in other locations, it clearly exists in Vermont. See Microbrightfield,
16 Inc. v. Boehringer, C. A. No. 1:05-cv-244 (Ruling on Defendant's Motion to Dismiss for Improper
17 Venue), 2006 U.S. Dist. LEXIS 17095 (D. Vt. Feb. 8, 2006) (denying defendant's request to
18 transfer venue); Advideo, Inc. v. Kimel Broadcast Group, Inc., 727 F. Supp. 1337 (N.D. Cal. 1989)
19 (denying request to transfer venue; at early stage, court cannot fully assess balance of conveniences
20 in alternative venues; "normally, however, plaintiff is entitled to choice of forum and defendant
21 bears the burden of justifying a transfer"). Because microDATA was the first plaintiff in these
22 competing lawsuits, its choice of forum (Vermont) should be honored.

23 Hubb's unsupported statement, that there is a "great danger of [the alleged passing off]
24 occurring in California" (Opposition at 10) is specious and legally meaningless, and it offers no
25 comparison to other locations where there may also be "danger." As noted above, in attending
26 trade shows in California, microDATA (and Hubb) are presenting to a national audience, not
27 specifically a California audience. The meaninglessness of Hubb's vague statement is especially
28 true since microDATA has made no sales in California and Hubb has produced no evidence of a

1 single instance of actual consumer confusion, in California or elsewhere, in the nine (9) years that
2 microDATA has been using the allegedly infringing mark in one form or another. See Declaration
3 (first) of Bruce Heinrich submitted with microDATA's Motion (June 11, 2007).

4 Once venue is properly established in one court, as it is in Vermont, venue can be shifted to
5 another court only pursuant to an analysis of the several criteria of 28 U.S.C. § 1404 (location of
6 the parties, location of witnesses, convenience, relative burdens, etc.). Hubb makes absolutely no
7 attempt to apply these factors to the specific facts of this case and explain why venue in California
8 is significantly more compelling than venue in Vermont, where microDATA is located and where
9 an action is already pending. The fact that the Vermont action is a declaratory judgment action
10 does not change the venue analysis. Venue is proper in Vermont, and was laid first. The fact that
11 it *might* also lie in California does not justify maintaining this second-filed action in favor of the
12 first-filed one.⁵

13 CONCLUSION

14 For the foregoing reasons, and for the reasons set forth in microDATA's Motion to
15 Dismiss, microDATA respectfully requests that the Court dismiss this action, allowing the first-
16 filed Vermont action to go forward.

17
18 Dated: July 12, 2007

TERRA LAW LLP

19
20
21 By: /s/ Breck E. Milde
22 Breck E. Milde (Cal. State Bar No. 122437)
23 Attorneys for microDATA GIS, Inc.
24
25

26 ⁵ In the event that the Court determines that this case is an exception to the first-filed
27 rule, such that this action should not be dismissed but should proceed, microDATA respectfully
28 reserves the right to more fully brief the personal jurisdiction issue and the issues of balance of
convenience and whether venue is more properly laid in Vermont than California.